No. 91-769

In the Supreme Court of the United States

OCTOBER TERM, 1991

ARTHUR ALVIN FAMBRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether there was probable cause to support the warrantless arrest of petitioner in the immediate vicinity of a just-completed drug transaction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-769

ARTHUR ALVIN FAMBRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B10) is unreported, but the judgment is noted at 935 F.2d 1296 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1991. A petition for rehearing was denied on July 24, 1991. Pet. App. A1-A2. The petition for a writ of certiorari was filed on October 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his conditional plea of guilty in the United States District Court for the Southern District of Georgia, petitioner was convicted of conspiracy to distribute cocaine base, in violation of 21 U.S.C. 846. The district court sentenced him to a term of 170 months' imprisonment, to be followed by a five-year period of supervised release, and fined him $5,000. The court of appeals affirmed.

1. The evidence adduced at a pretrial suppression hearing showed that on February 26, 1990, Sherod Martin, a confidential informant, telephoned Sims Walker to arrange a multi-kilogram purchase of cocaine. Walker told Martin to contact him the next day about the cocaine purchase. The following day, Martin contacted Walker by pager. Walker called Martin back two minutes later. The two men agreed that they would meet at approximately 4:00 p.m. at a local McDonald's restaurant and that Martin would purchase one kilogram of cocaine for $26,000. Pet. App. B2; Gov't C.A. Br. 2-3.

Police officers went to the restaurant, established surveillance, and arranged to videotape the side of the restaurant where Martin was to park. They also equipped Martin with a transmitter and gave him $26,000. After Martin parked at the restaurant, a woman drove up with Walker and a second man, Bobby Lee Freeman. Walker and Freeman got into Martin's car and discussed details of the cocaine transaction, including price and amount. Walker indicated that his supplier was nearby. He also implied that he had just obtained the cocaine, saying that he had picked it up, had not touched it, but had brought it directly to Martin. Walker then gave Martin the

cocaine in exchange for $26,000. Pet. App. B2-B3; Gov't C.A. Br. 3.

The police officers had planned to arrest Walker and Freeman while they were in Martin's car, but the two men left the car before the principal surveillance officer signaled the police to move in. Walker and Freeman entered the McDonald's restaurant. A minute later, the officers saw Walker, Freeman, petitioner, and three other persons in the parking lot on the other side of the restaurant. Walker was speaking to petitioner. The officers identified themselves, and not knowing where the $26,000 was, attempted to detain all six of the persons in the parking lot. The officers observed petitioner walking away and stopped him. Pet. App. B3-B5; Gov't Br. 3-4.

While patting petitioner down, a police officer felt a soft object in petitioner's front shirt pocket. Thinking that the object was drugs, the officer removed it from petitioner's pocket. The object was a small plastic bag containing pieces of white compressed powder that appeared to be cocaine. Petitioner was arrested and charged with possession of cocaine. Approximately two and a half hours later, after he had been advised of, and waived, his constitutional rights, he gave agents a statement admitting that he had helped to obtain the cocaine used in the Walker-Martin transaction. Pet. App. B5. Gov't C.A. Br. 4-5.

2. A magistrate judge recommended that the district court grant petitioner's motion to suppress the cocaine found in his shirt pocket. He reasoned that until the seizure the officers had no reasonable suspicion that petitioner had engaged in any criminal activity, including the just-completed one-kilogram cocaine transaction. Pet. App. B5, D1-D29.

The district court disagreed. The court found that there was an ample showing of probable cause to believe that petitioner was involved in the drug transaction. The court concluded that if there was probable cause to arrest, the associated search was permissible. Pet. App. B5-B6, C1-C3. See Gov't C.A. Br. 7-8.

3. The court of appeals affirmed. Pet. App. B1-B10. That court agreed with the district court that in light of "the totality of the circumstances as perceived by the officers at the time of the arrest, * * * there was probable cause to support [petitioner's] warrantless arrest." *Id.* at B8. It concluded that the search of petitioner's person and the confiscation of the cocaine did not violate petitioner's rights because the search "was incident to a lawful arrest." *Ibid.*, citing *Rawlings* v. *Kentucky*, 448 U.S. 98, 111 & n.6 (1980). The court of appeals rejected petitioner's contention that the search was unlawful because it was based on his mere association with, or proximity to, others independently suspected of criminal activity. Pet. App. B9. The court observed that because "the police had reason to believe that Walker's supplier was in the vicinity of the restaurant and that Walker intended immediately to hand over the proceeds of the deal to that supplier," they could have reasonably concluded that "the first person that Walker was seen speaking to, less than a minute after the transaction, might indeed be that supplier." *Id.* at B9-B10.

ARGUMENT

Petitioner contends (Pet. 17-21) that the warrantless search of his person was unreasonable under the Fourth Amendment because it was not supported by probable cause, but instead was based on mere suspicion. That contention is without merit and presents no issue warranting this Court's review.

The principles governing this case are well settled. Law enforcement officers may make warrantless arrests if they have probable cause to believe that the suspect has committed or is committing a crime. *United States* v. *Watson*, 423 U.S. 411, 415-417 (1976); *Gerstein* v. *Pugh*, 420 U.S. 103, 113 (1975). Probable cause to arrest exists when the facts and circumstances at hand would lead a prudent person to conclude that it is likely that an offense has been or is being committed. See *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949). The probable cause determination is based on the totality of the circumstances, viewed in a nontechnical, common sense, and practical manner. See *Illinois* v. *Gates*, 462 U.S. 213, 230-232 (1983).

Once police officers have made a valid arrest, they may conduct a warrantless search of the suspect. *New York* v. *Belton*, 453 U.S. 454, 461 (1981); *Michigan* v. *DeFillippo*, 443 U.S. 31, 35 (1979). While the authority to make a search incident to an arrest derives from a police officer's general need to disarm suspects or preserve evidence, *United States* v. *Robinson*, 414 U.S. 218, 234-235 (1973), the legality of the search depends only on the legality of the arrest, *id.* at 235. When police make a search incident to an arrest, they are not limited to a weapons pat-down of the sort that is permissible during an investigative detention, but may conduct a full search for weapons and evidence. *Id.* at 229, 235.

In the present case, as both of the courts below correctly found, the officers had probable cause to arrest petitioner. From the conversations they had monitored, the officers knew that Walker had just completed a $26,000 drug transaction and that Walker's supplier was likely to be in the immediate vicinity of the McDonald's restaurant. Only a minute after the transaction, they saw Walker speaking to petitioner in the restaurant parking lot, and they then saw petitioner attempt to leave when the police arrived. Those facts and circumstances were sufficient to establish probable cause to believe that petitioner was involved in the drug transaction. See *Brinegar* v. *United States*, 338 U.S. at 175-176.

Because the officers had probable cause to arrest petitioner, they were entitled to detain him, search his person incident to the arrest, and seize the drugs found in his shirt pocket. *United States* v. *Robinson*, 414 U.S. at 235. The exact order of the police action in this case is immaterial. This Court has held that where the formal arrest quickly follows the challenged search, it is not important that the search preceded the arrest. See *Rawlings* v. *Kentucky*, 448 U.S. at 111. Petitioner's formal arrest occurred immediately after the search of his person and satisfied the requirement that the search incident to arrest be closely related in time to the arrest.

The cases petitioner cites (Pet. 20, 22) do not support a different result. In *Sibron* v. *New York*, 392 U.S. 40, 62 (1968), this Court held simply that the defendant's conversations with narcotics addicts did not, without more, support an inference that the defendant was engaged in drug trafficking. In *Johnson* v. *United States*, 333 U.S. 10, 16 (1948), the government effectively conceded that it did not have probable cause to arrest the defendant before it conducted

a warrantless search of her room. The instant case is quite different. Petitioner's conversation with Walker took place only a minute after a major drug transaction and shortly after Walker had given the officers reason to believe that his cocaine supplier was in the immediate vicinity. In those circumstances, as the courts below correctly ruled, the officers had probable cause to believe that petitioner was also involved in the drug transaction.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS M. GANNON
Attorney

JANUARY 1992

---

* Even if, as petitioner argues, the evidence known to the police just prior to the detention of petitioner had not risen to the level of probable cause, it clearly amounted to reasonable suspicion. As a result, the police were entitled to detain, frisk, and question petitioner. See *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). When, in the course of the frisk, a police officer felt an object that he believed from his past experience to be drugs, the officer's reasonable suspicion to detain and frisk petitioner ripened into probable cause to arrest him. See 3 W. LaFave, *Search and Seizure* § 9.4(c), at 524 (2d ed. 1987). At that point, the officers were entitled to search petitioner's person incident to arrest and to seize the drugs from his shirt pocket. See *United States* v. *Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45230